

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Dennis Nelson,

Plaintiff,

vs.

9:05-CV-1096

Mr. Lee, Ms. Mitchel, Mr. Artur, and S. Jennett,

Defendants.

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APPEARANCES:

Dennis Nelson
Plaintiff *Pro Se*

Hon. Andrew M. Cuomo,
Attorney General of the State of New York
Stephen H. Schwartz, Esq., Assistant Attorney General
The Capitol
Albany, New York 12224
Attorney for Defendants

Hon. Norman A. Mordue, Chief U.S. District Judge

MEMORANDUM-DECISION AND ORDER

In this action pursuant to 42 U.S.C. § 1983, plaintiff, a New York State prison inmate, alleges that prison officials were deliberately indifferent to his serious medical needs. Plaintiff's complaint (Dkt. No. 1) claims that his lower left leg is gangrenous and painful, that the nurse refuses to give him more pain pills, and that he needs the leg amputated as soon as possible before the gangrene spreads and kills him. He seeks monetary damages. Arguably, the complaint may also be read as seeking an injunction to compel performance of the amputation.

Defendants move (Dkt. No. 40) for revocation of plaintiff's *in forma pauperis* ("IFP") status and for conditional dismissal of his complaint under 28 U.S.C. § 1915(g), unless he prepays

in full the applicable filing fee. Plaintiff submitted no opposition to defendants' motion.

Defendants' motion was referred to United States Magistrate Judge David E. Peebles pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.3(c). In his Report and Recommendation (Dkt. No. 44), Magistrate Judge Peebles recommends that the motion be granted on the ground that three or more inmate civil rights actions previously brought by plaintiff have been dismissed on the merits, and plaintiff has not shown that he is in imminent danger of serious physical injury.

See 28 U.S.C. § 1915(g).

Plaintiff objects (Dkt. No. 45) to the Report and Recommendation. Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court reviews *de novo* those parts of a report and recommendation to which a party specifically objects. Where only general objections are filed, the Court reviews for clear error. *See Brown v. Peters*, 1997 WL 599355,*2-* 3 (N.D.N.Y.), *aff'd without op.*, 175 F.3d 1007 (2d Cir. 1999). Failure to object to any portion of a report and recommendation waives further judicial review of the matters therein. *See Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir. 1993).

In his objection, plaintiff does not deny that three or more inmate civil rights actions previously brought by him have been dismissed on the merits. With respect to imminent danger, he states in his objection that the hospital in his facility has scheduled surgery by an outside specialist to amputate his leg from the knee down. He then states: "Or you David E. Peebles can get me an order to have me put into Albany Medical Center for a better adequate [sic] medical care before this spread[s] to my heart and kill[s] me." It thus appears that the amputation plaintiff seeks in his complaint has been scheduled, and that the relief he now seeks from the Court is an order directing that the surgery be performed at Albany Medical Center. Plaintiff is not entitled to such relief. On this record, plaintiff has not shown that he is in imminent danger of serious

physical injury so as to invoke the exception to section 1915(g).

It is therefore

ORDERED that the Report and Recommendation of United States Magistrate Judge David E. Peebles (Dkt. No. 44) is accepted and adopted; and it is further

ORDERED that defendants' motion (Dkt. No. 40) is granted; and it is further

ORDERED that the order (Dkt. No. 7) granting *in forma pauperis* ("IFP") status to plaintiff is hereby vacated; and it is further

ORDERED that the complaint is hereby dismissed without prejudice as to all defendants and all claims unless plaintiff pays the full required filing fee of \$350 within 30 days after the date of this Memorandum-Demand and Order; and it is further

ORDERED that **PLAINTIFF IS HEREBY WARNED THAT HIS FAILURE TO PAY THE FULL REQUIRED FILING FEE OF \$350 WITHIN 30 DAYS AFTER THE DATE OF THIS MEMORANDUM-DECISION AND ORDER WILL RESULT IN DISMISSAL OF THIS ACTION** without prejudice; and it is further

ORDERED that all discovery in this action is hereby stayed pending the payment by plaintiff of the required filing fee; and the dispositive motion deadline is hereby stayed pending further order of Magistrate Judge Peebles.

IT IS SO ORDERED.

December 5, 2007
Syracuse, New York



Norman A. Mordue
Chief United States District Court Judge